Supreme Court, U.S.
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No. 95-1977

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMMODITIES EXPORT CO.
and WALTER H. LUBIENSKI
Petitioners,

V.

THE UNITED STATES and
DETROIT INTERNATIONAL BRIDGE COMPANY
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT DETROIT INTERNATIONAL BRIDGE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: July 8, 1996

Corporate Listing

Respondent Detroit International Bridge Company is a wholly owned subsidiary of Centra, Inc.

Detroit International Bridge Company has no nonwholly owned subsidiaries.

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ARGUMENT

PETITIONERS HAVE ADVANCED ABSOLUTELY NO BASIS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The rules of this Court and its precedent make it clear that a Writ of Certiorari will not be granted except for compelling reasons. Rule 10 specifies the considerations which might lead the Court to grant such a writ to review a decision by a Federal appeals court:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; [or]
>
> . . .
>
> (c) a United States court of appeals has decided an

> important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R.10. Petitioners do not even attempt to claim that the writ they seek satisfies one or more of the above requirements -- nor could they. The per curiam decision of the Sixth Circuit Court of Appeals merely affirmed the denial of a preliminary injunction. Both that holding and the ruling of the district court were fact-driven decisions that involved neither a federal question nor any novel legal issue. Petitioners simply failed below in their attempts to gain a preliminary injunction in a condemnation action -- a decision compelled by the district court's finding that petitioners had satisfied none of the four requirements for such an injunction. (See A56-A59)

As is evident from petitioners' failure to argue otherwise, the Sixth Circuit's decision does not conflict with any decision of another court of appeals; does not conflict with a decision by a state court of last resort; and certainly does not depart in the least from the accepted and usual course of judicial proceedings. In sum, there are no federal questions involved; there are no conflicting decisions of other courts; and there is no conflict with any

decision of this Court. There is simply no basis for certiorari.

Recognizing this fact, petitioners attempt in vain to argue the applicability of Local Number 93, International Assoc. of Firefighters v. Cleveland, 478 U.S. 501 (1986). This is a disingenuous and desperate attempt to find some basis to evoke this Court's interest. In fact, Local No. 93 has never once been mentioned by petitioners in any brief in this case prior to the filing of the petition for writ of certiorari in this Court -- and with good reason. That case is wholly inapplicable.[1/]

Notably, petitioners do not actually argue that the decision below conflicts with this Court's decision in Local No. 93. Clearly, such an argument would be frivolous. To the extent Local No. 93 addressed the rights of intervenors, that decision gives petitioners no more rights than they have exercised. Petitioners have already been allowed to intervene and to state their objections to the Memorandum of Agreement ("MOA") at length. Their failure to present testimonial evidence was self-imposed, since they did not request an opportunity to do so until after the hearing held by the district court.

1/ In addition, petitioners are precluded from raising an argument for the first time in this Court. Patrick v. Burget, 486 U.S. 94, 99 n.5 (1988) (Court will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower court); Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) (same).

In any event, however, the MOA does not impose any duties or obligations upon petitioners -- thus bringing it squarely within the holding of Local No. 93 that an order can be entered without an intervenor's consent. See 478 U.S. at 529-30. Indeed, petitioners apparently fail to comprehend that this Court upheld the decree at issue in Local No. 93.

Among the other problems with petitioners' belated and ill-conceived attempt to apply the decision in Local No. 93 to the case at bar is their failure to appreciate the difference between a consent decree which directly affects the rights of individuals who are not parties to that decree and a decision by the government to exercise its right of eminent domain. Petitioners' argument, if accepted, would allow any landowner or business to prevent the condemnation of its property without its consent. For more than a century, this Court has uniformly rejected similar contentions. See, e.g., National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); United States ex. rel. TVA v. Welch, 327 U.S. 546 (1946); Georgia v. City of Chattanooga, 264 U.S. 472 (1924); Rindge v. County of Los Angeles, 262 U.S. 700 (1923); Bragg v. Weaver, 251 U.S. 57 (1919); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896); Luxton v. North River Bridge Co., 153 U.S. 525 (1894); Shoemaker v. United States, 147 U.S. 282 (1893).

Petitioners' additional arguments require little further consideration. Indeed, the petition's complete lack of merit is amply demonstrated by petitioners' own arguments. For example, petitioners argue that the involvement of respondent Detroit International Bridge Company ("DIBC") in the renovation of the Federal facility at the Ambassador Bridge negates the public purpose of that project. Petition for Certiorari ("Petition") at 26-27. As this Court's previous decisions have made crystal clear, such private involvement does not lessen the public purpose of such a project. See National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

Petitioners even appear to argue that because DIBC owns the Ambassador Bridge, the road across the bridge is not a public roadway but a "private road on a private bridge." See Petition at 27 (emphasis in original). The preposterous suggestion that private ownership strips the Federal project of its public purpose is refuted by the fact that the Bridge is the highest-volume commercial border crossing in the United States and by this Court's long-established recognition that condemnation actions related to public roadways -- regardless of ownership -- have involved "public uses" and "public purposes" "from time immemorial." Rindge v. County of Los Angeles, 262 U.S. 700, 706 (1923); see also Luxton v. North River Bridge Co., 153 U.S. 525 (1894) (improvement of bridge has public purpose).

In short, petitioners' application is devoid of any merit. Nothing more need be said. However, in accordance with this Court's Rule 15(2), respondent is constrained to note that, as it has repeatedly pointed out in the proceedings below, petitioners' statement of the case is replete with inaccuracies. Even if all of those inaccuracies were correct, petitioners would state no legitimate entitlement to a writ of certiorari. Nevertheless, the inaccuracies should not go unremarked. Among the many false and misleading characterizations made by petitioners are the following:

- "DIBCO . . . [has] a strong vested interest in eliminating Commodities." Petition at 5. DIBC is only interested in the safe and efficient flow of traffic over the Ambassador Bridge and through the customs facility; the problem is Commodities' location, not its existence.

- A "key feature" of the MOA is that "Commodities will cease to exist." Petition at 7-8. The MOA makes no reference to Commodities, or to the numerous other properties and businesses that have been or will be condemned in the course of the Federal project.

- "The meeting . . . and the negotiations leading up to the signing of the MOA . . . were all secret." Petition at 7. As DIBC

and the United States have repeatedly stated, before both the district court and the court of appeals, that allegation is simply untrue.

- Petitioners imply that DIBC was involved in the rejection of Commodities' alternative plans for the expansion of the Federal facility. See Petition at 8. The rejection of Commodities' proposals was solely the decision of the General Services Administration, which addressed those proposals -- and all other public comments -- in the Environmental Assessment performed for the Federal project. Moreover, the fact that petitioners submitted such plans belies their claimed lack of knowledge and lack of an opportunity to provide input into the planned expansion of the Federal project.

- "[T]he First Sixth Circuit mandate (A15-A34) gave petitioners the right to challenge the MOA on the grounds of necessity and expediency." Petition at 11. As the court of appeals clearly stated, "[c]ontrary to intervenors' assertions, the [prior] panel did not decide anything related to the merits of their cause, and their entitlement to intervention was the only 'law of the case' at that point." (A3) (emphasis added)

- The United States Government "reneged on its agreement not to condemn Commodities." Petition at 13. The text of the letter upon which this allegation is based, quoted at pages 12-13 of the Petition, itself belies this claim. The United States never agreed (or promised) any such thing. Moreover, as the district court pointed out, even if such assurances had been given, the government is entitled to change the boundaries of the land to be condemned. (A50 at n.8)

- "There has been no mediation or extension" of the MOA. Petition at 17. This claim -- made ad nauseum by petitioners in the courts below -- deliberately fails to acknowledge that the government and DIBC continue to work together, by mutual consent, to implement the MOA.

Indeed, petitioners' whole speculative claim -- that the United States and DIBC are engaged in a conspiracy to put Commodities out of business -- has never been supported by a single demonstrated fact. As the district court stated, after petitioners were allowed to intervene and present their case,

> to the extent that Commodities and Lubienski persist in their argument that

> the stated public purpose of the bridge project is a sham and a coverup for the purpose of putting Commodities out of business (to benefit its duty-free shop competitor, Ammex, Inc.), Commodities has come forward with no hard evidence to substantiate its wholly speculative allegations.

(A56 at n.10 (emphasis added).)

Even without any such evidence, petitioners have already succeeded in delaying the completion of an important Federal project by exercising their right to intervene, to be heard, and to appeal the denial of a preliminary injunction. The Sixth Circuit affirmed the district court's decision in a per curiam opinion, and denied petitioners' request for rehearing or rehearing en banc. Petitioners have raised no significant issues in their Petition, and there is no reason to occupy this Court further with this matter.

CONCLUSION

For the reasons stated above, respondents respectfully submit that petitioners' Petition for a Writ of Certiorari should be summarily denied.

Respectfully submitted,

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